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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 419

PATRICIA DEALESANDRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Patricia DeAlesandro, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on June 7, 1966.

Opinion Below

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 7, 1966 (Appendix B hereto, *infra*). The time for filing this petition for certiorari has been extended to and including August 5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioner, a young married woman of exceptional physical attractiveness, was convicted of attempting to influence a Federal trial juror on behalf of a friend of hers (and of her husband's) who was a defendant in the jury trial in question.

1. Was petitioner denied her constitutional right to freedom from self-incrimination, assistance of counsel, due process of law and a fair trial by instructions which permitted the Jury (in her own trial for jury tampering) to consider exculpatory statements made by her to the arresting agents, in the absence of counsel, as circumstantial evidence from which consciousness of guilt might be inferred?

2. Is the so-called "false exculpatory statements" rule rationally and justly sustainable at all, as a matter of due process?

3. Is the rule of circumstantial evidence referred to in the above questions 1 and 2 applicable in any event in the present case in view of the facts that (a) the exculpatory statements involved consisted only of protestations of innocence and of innocent conduct, (b) no other allegedly *false* exculpatory statements were shown,* (c) the Trial Court did not resolve, and the Jury was given no guidance concerning, a diametrical conflict between the defendant's testimony and the testimony of the arresting agent as to whether the defendant had been warned of her constitutional rights to remain silent and to the assistance of counsel (the decisions, *infra,* indicating that such warning is prerequisite for operation of the false-exculpatory-statements rule), and (d) the questioning of the defendant

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* We demonstrate *infra* that the Court below was simply wrong, on the record, in thinking that any such *false* exculpatory statements were shown.

at time of arrest which yielded the alleged false exculpatory statements was without benefit of counsel and indeed (according to the defendant's testimony) her inquiry to the arresting agent concerning need for counsel was deceptively parried by the agent?

4. In this intrinsically sensationalistic prosecution where prejudicial inflammatoriness underlay the case as a continual potentiality because of the petitioner's physical appearance and the nature of the charges, was petitioner denied a fair trial by improper and inflammatory tactics of the prosecution in repeatedly making exhortations to the jurors which amounted to asking them to identify themselves in a subjective emotional way with the complaining witness (the juror allegedly attempted to be influenced by the petitioner), the jurors in petitioner's trial being in effect exhorted by the prosecution to act in a spirit of personal solidarity and vindictiveness with the complaining witness as a former juror who had allegedly been subjected to temptation by the wiles of a voluptuous young woman of easy sexual morals?

5. Was petitioner denied a fair trial by the Trial Court's refusal to submit to the Jury the important substantive theory of the defense addressed to that view of the evidence under which the Jury could have concluded that the complaining witness himself had behaved in such a manner as to generate a situation of loose and careless talk in which the petitioner had no corrupt or criminal intent to endeavor to influence the complaining witness as a juror—this substantive theory of the defense which the Trial Court refused to submit to the Jury having been formulated in defense Request No. 2 for instructions to the Jury, reading as follows:

> "If you find that Kenneth Feldman on May 18, 1965 'fooled around' with defendant, knowing she was a married woman, offered her a gift in his shoe store, invited her to dinner, as he admitted, wined and dined

her in a public restaurant, and if you find that he said on that evening in jest, to defendant 'How well do you know him, perhaps I can get a shoe store out of this', and if you find that he violated the Court's instructions not to talk about the case by disclosing that he was a juror in a pending case, and if you find that he thus set the style of loose and careless talk, and that the defendant responded in kind, then you may find that the defendant had no intent and made no corrupt endeavor to influence the juror's verdict in the case of United States v. Armone, and in that event, you must find the defendant not guilty."

6. Was petitioner denied a fair trial by the failure to instruct the Jury, in lieu of the charge requested by the above quoted Request No. 2, that if the complaining witness were found by the Jury to be an accomplice, his testimony should be scrutinized in the required manner; and by failure to charge that, according to the better practice, such accomplice testimony should be corroborated?

7. Was petitioner denied a fair trial, and her constitutional right against being placed in double jeopardy or being subjected to double punishment, by the submission to the Jury of both counts of the indictment (which the Court below has conceded "charged essentially the same acts")?

Constitutional Provisions and Statutes Involved

The case involves 18 U.S.C. §§ 201 (Bribery Of Public Officials And Witnesses) and 1503 (Influencing Or Injuring Officer, Juror or Witness Generally); the pertinent portions of these statutes are quoted in Appendix C hereto, *infra*. It also involves the Fifth Amendment protections as to due process of law, self-incrimination and double or multiple punishment, and the Sixth Amendment right of counsel.

Statement of the Case*

1. Preface.

Our young lady petitioner is presently incarcerated at the Federal Reformatory For Women in Alderson, West Virginia, serving the unusually severe sentence which was imposed on her in this case—five years—and our efforts thus far to obtain her release on bail pending certiorari have not been successful; no bail application has yet been made before a Justice of this Court. Both the bail and this certiorari application are of unusual importance to this particular petitioner in the personal sense because she is pregnant, delivery being expected during the first week of September 1966. She went to prison June 20, 1966, after both Courts below complied with the Government's insistence that bail not be continued after the conviction had been affirmed (June 7, 1966). Petitioner was evidently already pregnant at or around the time of her trial (November 15-17, 1965). She was sentenced January 3, 1966, and her appeal was perfected, argued and decided very expeditiously, as the Government kept pressing with surprising avidity to get this pregnant young married woman behind prison bars as quickly as possible.** Under all of these circumstances we are naturally concerned to bring the merits of petitioner's case to this Court's attention in the fullest possible manner in this petition for

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* " a" refers to the printed "Appendix For Appellant" in the Court below, nine extra copies of which are filed herewith.

** The reason for the Government's avidity is apparently revealed in the sentencing minutes (R. 320-322), where the Government practically in so many words besought the sentencing Judge to impose a heavy sentence as a means of coercing petitioner to "cooperate" by informing against other persons. In our forthcoming bail application before a Justice of this Court we shall be obliged to speak further of the dubious constitutionality of administering the Federal law of bail (U. S. Const., Amendment VIII; F. R. Cr. P. Rule 46) on the basis of such inhumane considerations and prosecutive motivations.

certiorari. In particular, the tone of guilt which inevitably attends the case as it comes before this Court after the adjudications against petitioner by the Courts below, needs to be dealt with on petitioner's behalf because, notwithstanding the latter adjudications we are respectfully convinced that there has been a miscarriage of justice in this case not only on the law but on the facts as well; and we of course would want this Court to have before it our own factual evaluation as a matter of "atmospheric" realism even though we realize that the Court in reviewing criminal convictions does not look into the factual correctness of jury verdicts. We have therefore written an unusually lengthy petition for certiorari which contains a more complete recital of the facts than would be possible in a petition of conventional length petition; and we respectfully pray the Court to take the short additional time needed to examine those more complete factual recitals. We would not thus impose on the Court if the case were not one of such exceptional personal urgency for our young lady petitioner.

2. Introductory.

Petitioner was convicted, after a jury trial, in the United States District Court for the Southern District of New York (MacMahon, D. J.), on one count of offering, etc., to influence a petit juror in violation of 18 U.S.C. § 201, and one count of endeavoring to influence the same petit juror in the same matter in violation of 18 U.S.C. § 1503 (130a, being the judgment of conviction; 4a, being the indictment). Petitioner was sentenced to five years on each count, to run concurrently (131a). On appeal to the United States Court of Appeals for the Second Circuit (132a), the judgment of conviction was affirmed (Appendices A and B hereto, *infra*).

The charges of attempted jury-tampering in this case are based on alleged statements in a dinner conversation

on May 18, 1965 between the petitioner and a then Federal trial juror, Kenneth Feldman, who was serving as such juror in the then narcotics trial of *United States* v. *Armone, et al.*, S.D.N.Y. The Government contended that petitioner's alleged approach to Feldman was on behalf of Joseph Armone, a defendant in the latter trial. Feldman and the petitioner were the sole witnesses at the within trial who were in a position to give direct testimony about the alleged jury-tampering approach, petitioner having taken the stand to defend her innocence.

The petitioner, Mrs. Patricia DeAlesandro, née Wheeler, is twenty-six years old, was married in 1963, resided with her husband in New York City until her recent incarceration, formerly worked as a fashion model and showgirl, and as earlier mentioned has never before been in trouble with the law. She came to New York in 1961 from her family home in Michigan.

3. The Trial Proofs.

(a) *The Government's Proofs.*

Kenneth Feldman, the trial-juror-complaining-witness, testified that he was manager of a store known as Capezio Fashion Shop in Manhattan (9a-10a). At that time (May 1965) he was also serving as a juror in the Armone trial in the Southern District (10a). On May 18, 1965, he was at the Capezio store when at about 4 P. M. Mrs. DeAlesandro entered the store (10a-11a). The first question which the prosecutor asked Feldman, after eliciting the above facts,* concerned Mrs. DeAlesandro's coiffure on that occasion, and the witness replied, "A. Long, over her shoulders,

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* There is no dispute that Mrs. DeAlesandro came to the Capezio shop on the day in question, conversed with Feldman at that time and later that same evening (*infra*) dined with him.

colored platinum blonde" (11a).* The prosecutor's next question was, "And how was she dressed", to which Feldman replied, "She was wearing toreador pants and a light colored pullover jersey, extremely low cut"** (11a). We quote the next question and answer for their interesting indication of, on one hand, the Government's efforts to exploit a maximum suggestiveness and, on the other hand, Feldman's testimonial prudence in regard to items which he and the prosecution evidently knew could not be pushed too far (in view of the fact that Feldman was not the only employee present in the Capezio shop at the time in question—*infra*) (11a-12a):

"Q. And what did you do or what did the defendant (16) do after she came into the store? A. Well, near

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* We respectfully call attention to the tendentious nature of this "question and answer" at the virtual outset of the Feldman testimony because it denotes the whole tone of the sanctimonious tactics of the prosecution in this trial as regards Mrs. DeAlesandro's physical attractiveness to the male eye; and because, as will appear, Feldman's testimony on this subject was manifestly designed to produce an impression of seductive luridness which is not supported by anything else even in the Government's own proofs, and indeed is negated by the testimony of other Government witnesses who would have been free of Feldman's own indicatedly questionable motivations in depicting Mrs. DeAlesandro as a nefarious sexual temptress.

** See the last preceding footnote; and, again, see *infra* the indications that the prosecutor's questioning was unfairly designed to play upon the jurors' sensibilities in that complex emotional area of the human mind where virtuous indignation is spurred by one's own guilt over sexual temptation. The jurors were being invited—without fair foundation in the testimony as a whole (*infra*)—first to experience vicariously the alleged allure of Mrs. DeAlesandro, and then virtuously to condemn her. There unfortunately ran through the entire prosecutive "style" in this case the theme that the trial jurors in this prosecution ought personally and subjectively to conceive themselves as imaginatively being in the same position as Kenneth Feldman, *viz.*, as a Paragon of Virtue Triumphant Against Evil Temptation. Regrettably, the United States Government appears to have regarded this case as "most likely to succeed", not on the basis of authentically factual trial proof, but on the basis of subjective appeals to some ambivalent community standard of female behavior.

the entrance of the shop we have a rack on which we display some garments. Included among those garments are jump suits, so-called. It is a fashion version of a union suit. In fact, these are made of a lace, actually transparent.

When I approached her, I asked her if I could help her and she said yes, she was interested in purchasing one of these—one of the jump suits on display.

As I recall, she made a selection, a white jump suit. I suggested that she try it on, that if it didn't fit, after she took it home she wouldn't be able to return it. She said no, that would be all right, she was sure it would fit.

At this point—oh, at this point, in fact, she said to me that I looked familiar to her. I told her it was quite possible, I spent a great deal of time in the shop. She said no, it wasn't in the shop, it must have been elsewhere. I said, well, I use the subway to and from work and, in fact I have been using the subway to come from my service as a juror in Foley Square and I get on at the Brooklyn Bridge Station.

(17) Well, as I recall, there was nothing more said at that point."

Thus we see how, in the testimony above quoted, Feldman gratuitously played upon the suggestively revealing nature of the "lace, actually transparent" "jumpsuits" which a moment later he likened to a "unionsuit", that Mrs. DeAlesandro selected "a white" item of this type of garment; and then, most interestingly, Feldman let slip the fact that he "suggested that she try it on"; his next statement, that Mrs. DeAlesandro deemed unnecessary any such fitting, had such testimony by him been otherwise, would have encountered the difficulty that other salespersons in the Capezio shop who may have been in a position to know the facts were not going to confirm that any such revealing try-on of the "transparent" garment actu-

ally occurred; and then Feldman's above quoted testimony continued with the item of Mrs. DeAlesandro's saying that he looked familiar to her, *whereupon* (*according to Feldman's own testimony*) *it was he who first injected the fact that he was at that time serving as a juror in Foley Square.*

Feldman further testified that as he was totalling the sales slip Mrs. DeAlesandro asked him if he was married, he said he was not, he told her that he noticed she was wearing a wedding band, and then she said she was married and added "but I fool around" (14a). At that Feldman suggested to Mrs. DeAlesandro that instead of taking her purchase with her, she should leave a deposit and return after Feldman closed the shop at 6:30, "and perhaps we could go out somewhere" to which Mrs. DeAlesandro responded "Sure, fine" (14a).

Feldman further testified that about 6:35 P.M. Mrs. DeAlesandro returned to the store, the door being locked, he unlocked the door to admit her, they completed the sales transaction, he invited her to have dinner with him, they had some discussion as to where to dine as Feldman evidently feared detection by her husband (with whom she told him she was living at the time), she recommended a Spanish restaurant called "Trini's" at Amsterdam Avenue and 73rd Street, Feldman expressed concern that her husband might hear of their going to "Trini's" together since she said she had eaten there regularly, she reassured him saying this was alright ("He knows I have friends"), then he offered her a gift of something from the shop that he would purchase at his manager's price, but she declined (16a-17a).

They took a taxi to the restaurant at 73rd Street and Amsterdam Avenue; during this cab ride Mrs. DeAlesandro spoke about the unfairness of the machinery of justice as against accused persons (19a).

When asked about his conversation with Mrs. DeAlesandro in the restaurant, Feldman began by saying again that she had talked critically about justice in New York; further, she asked him if he had compunction about serving as a juror, and when he said he felt it was his duty, she said that was admirable but she could not do it; she also told Feldman that she and her husband had a friend who was wrongly accused and who was on trial in the United States Court House;* she and her husband knew that their friend was innocent, and in fact the Government had succeeded in getting as a witness a man who had a fifteen-year sentence which had been reduced to five years in return for his testimony against their friend; at this, Feldman said to her "Well, this sounds just a little bit too familiar. Could we get off this subject once and for all?"; after he had asked Mrs. DeAlesandro to stop talking about the subject, she said that their friend's name was "Steve Armone" (19a-20a). Feldman then said to her that that man was not on trial in the case in which he was sitting, and if he were on trial in that case she would certainly understand that he could not discuss the matter with her or anyone else, to which she replied, "Well, that's alright. We legal secretaries talk about these things all the time" (21a). Feldman said that she then asked him how much money he made and he told her he made a living; she then asked him if he might like to go into his own shoe business, and he said he did not have the necessary capital and besides he would not want the extra work and responsibility (21a). Feldman said that Mrs. DeAlesandro then asked how he would like to take a trip to Europe and how much vacation he got in his job, he told her two weeks, and that he supposed he could ask for extra time for a trip to Europe but he

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* At this point Feldman interjected in his testimony that, "In fact she had mentioned to me earlier on that she was a legal secretary at the Courthouse" (20a).

didn't expect to be able to do this in the near future as he could not afford it, after which Mrs. DeAlesandro said she had been to Europe and it was wonderful and everyone should go, to which Feldman said he answered her that, again, he did not expect to be able to go to Europe in the near future "and, please, can we talk about something else" (21a-22a). Feldman said that Mrs. DeAlesandro then said to him "In an unmistakably asking voice the words 'five thousand dollars?' " (22a). Feldman testified that he then said to her, "now, please, this conversation has gone far enough. I don't want to talk about this any further. Let's just get away from it" (22a). She then said to him, "Suppose a proposition were made to you whereby at the right time you would remember who your friends were?", to which Feldman said he replied that "I thought this was academic, I didn't think such a thing could happen, and if it did happen I certainly wouldn't be interested in it" (22a). Feldman further testified that at that point he made excuses to leave, he called for the check, and they left the restaurant (22a-23a).

Henriette Laurencelle, a salesgirl in the Capezio shop, testified that she heard Mrs. DeAlesandro say to Feldman that she thought she had seen him before, perhaps on the subway, Feldman said yes he had been on the subway because he was at that time a juror, Mrs. DeAlesandro said that that was a coincidence because she was a secretary to a Judge and she must have seen him on the subway coming uptown (31a). When asked what color hair Mrs. DeAlesandro had, the witness said "long blonde hair" (31a). The "3500" document of the FBI interview in which Miss Laurencelle claimed to have told the agent that Mrs. DeAlesandro told Feldman she was a secretary to a Judge contained no such item (31a-32a—see defendant's Exhibit A).

Susan Ann Levett, another salesgirl from the Capezio shop, described Mrs. DeAlesandro's attire at the shop on

the day in question as "pants and a scoop-necked* sleeveless, striped top", and the color of her hair as "light blonde" (33a).** The only conversation which Miss Levett recalled was that Mrs. DeAlesandro had "said something to the effect of having seen him somewhere before. I think she said something about living on Central Park West. He said something about having been downtown recently. They finally concluded the conversation by deciding that they had probably seen each other on the subway" (33a-34a). Although the witness said that that was all the conversation she recalled, the prosecutor was allowed over defense objection to ask her the leading question, "Did this young lady say anything with respect to her occupation" and the answer was that she said "something about working for a judge", (34a).

FBI Agent Charles G. Campbell (35a, *et seq.*) testified concerning the arrest of Mrs. DeAlesandro on July 12, 1965 in Sunnyvale, California, at her brother's home (35a-36a). Agent Campbell said that he advised her of her constitutional rights of counsel and to remain silent, and that anything she said might be used against her (36a). Compbell said that en route from her brother's home to the local jail Mrs. DeAlesandro asked what the charges were and he told her they had to do with her approaching a juror in a narcotics trial that was in progress in New

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* We are unable to cite legal authority for "judicial notice" of ladies' clothing fashions, but the style of jersey top which Mrs. DeAlesandro was described by the witness Susan Ann Levett as wearing on this occasion was widely worn by young women during the warm weather months of 1965, and it was not remotely describable as "extremely lowcut" (Feldman's tendentious description—11a, and see our summary of Feldman's testimony *supra*). This supposedly wicked garment of Mrs. DeAlesandro is also familiarly known as the "tank top jersey".

** It will be noted that neither of the Capezio salesladies (females being axiomatically more reliable observers than men in describing other females' hair color and style) confirmed Feldman's lurid description of Mrs. DeAlesandro's hair color as being "platinum".

York about the time she left there (36a). He said she denied knowing anything about such a narcotics trial, or about the charge of having had anything to do with any such juror (36a). When the agent asked her about her trip to California and her departure from New York, she said that she had come to California with her mother, had left New York because she and her husband were having difficulty, she had planned to go to Mexico but had not done so, she had gone to "Long Island"* for a short vacation, after that she had gone to Michigan to her mother's home, and from there she and her mother had driven by automobile to her brother's home in Sunnyvale, California (36a). On cross examination of Agent Campbell it was revealed that when the Agent telephoned the brother's home in California about thirty minutes before going there to arrest Mrs. DeAlesandro, the brother told him she was there, the Agent replied that he would be there in a few moments, and when the Agent arrived she was there (37a).

FBI Agent Norman F. Simon testified that he was unable to locate Mrs. DeAlesandro in an investigation he made during June, 1965, in the Detroit-Port Huron area (38a-39a).

FBI Agent Edward Knartzer (39a *et seq.*) testified that from May 19, 1965—which was the day following the alleged approach to juror Feldman—until July 12, 1965, the FBI had beeen unable to locate Mrs. DeAlesandro in New York or elsewhere (39a-42a).

(b) *The testimony for the Defense.*

The defense called character witnesses (47a-51a). The defendant took the stand in her own defense. She had never been convicted of a crime (51a). She was born and

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* In her own testimony (*infra*) Mrs. DeAlesandro said she had gone to City Island.

brought up in Michigan where her mother still resides, and she visits her mother several times a year (51a); her continuing contact with her family has included financial help from her father after she came to New York from Michigan in 1961 (51a); she was married in June 1963 (51a); before that she did fashion modeling and worked in the Copacabana (52a); since being married she worked recently as receptionist and manager of a beauty salon (52a). She never worked as a legal secretary, or in any capacity of employment for a judge, and she never told anyone that she was a legal secretary, or secretary to a judge, or working for a judge (52a).

In the spring of 1965, she and her husband had been having marital trouble occasioned by his working nights, "and we had no family life at all" (53a).

Prior to her visit to the Capezio shop on May 18, 1965 she had bought shoes there many times, she had been in the store at least two or three times a year, and she still had at home shoes which she had bought there (54a). From those prior visits to the Capezio shop she had a cordial greeting acquaintance with Feldman (54a). Feldman greeted her when she came into the shop on May 18, 1965 (54a). She told him she was interested in a particular type of white boots, a salesgirl showed her some, she then asked to see low-heeled shoes, Feldman said there were some on sale in the back room and offered to show them to her, she went into the back room with Feldman where she was looking over the shoes that were on sale there, he then brought the white boots into her there, one of the heels was too tight, he said he could fix it, when she went to pay for the boots he said he was busy and asked her to come back later when he would fix the heel, she left a deposit, and she came back later to pick up the package (55a).

When she returned at 6:30, which was when Feldman had told her to return to pick up her purchase, Feldman had evidently fixed the tight boot heel and it fit (56a).

Feldman then asked her where she was going now, and she said she was going to eat and then go home; he asked if she was going to eat with her husband; she asked how he knew she was married; he said he saw the ring on her finger; she said she was not going to eat with her husband because he was not coming home until 9 o'clock; Feldman asked her to have a drink or a bite to eat with him; she declined; he coaxed her, and then she consented to have dinner with him (56a). She denied that she ever said anything like "I am married, but I fool around" (56a). She accepted Feldman's invitation "because my husband and I had been fighting and I was, you know, very upset and I didn't think. I was tired of eating alone. That is the truth" (56a). Feldman suggested that they dine some place in the Bronx and that they go in his car, but she said she would rather go to a place that she knew in the neighborhood, she would feel safer there; he suggested taking his car, but she favored a cab; she denied Feldman's testimony that there was any "talking about politics" or any significant conversation in the cab on the way to the restaurant (56a-57a).

On the crucial alleged conversation at the restaurant as testified to by Feldman, Mrs. DeAlesandro's testimony was as follows (61a-64a):

> "Q. Mr. Feldman said that you mentioned the name of Steve Armone several times. Did you mention that name at all during your conversation with Mr. Feldman? A. I never mentioned the name Steve Armone.
>
> Q. Had you known Steve Armone before he died in '59? A. No, sir, I never met him or knew him.
>
> (127) Q. Mr. Feldman said that you injected into the conversation something about a witness in the pending case who had been heavily sentenced, sentence chopped down, and that he gave some false testimony. Did you make any such statement?
>
> • • • • •

A. No, sir, I did not. I didn't even know that he was on trial.

Q. Until you spoke with Mr. Feldman, did you know that the case of U. S. v. Armone and others was pending on trial in the Southern District? A. No, sir, I did not.

Q. When did you first learn that that case was pending on trial and one of the jurors was Kenneth Feldman? A. When Kenneth told me himself.

Q. You had never attended any of the court sessions in that case? A. No, sir, I didn't even know he was on trial.

Q. He referred or stated that during the conversation you made some reference, or some reference was made, to a trip to Europe. What do you remember (128) of that part of the conversation? A. He was talking—first of all, through the whole thing he was telling me how tired he was and how much work he had to do because he was on jury duty, and he said the case was going on for three or four weeks and that his boss was on vacation and that he had all of his boss' work to do besides going back to the shop after working nights, and he kept telling me how tired he was.

And I said, 'Why don't you quit jury duty?' And he said he couldn't. And I said, 'Why?' And he said, 'You have to have a good reason.'

And I said, 'Take a vacation when it is all over.' He said, 'I will. I have a few weeks coming to me.'

Then we continued talking about his vacation. I said, 'What are your plans? What are you going to do?' He said he had no idea yet.

And I had told him that my husband had been in Europe and it was great 'And you should go. Everybody should go. I'm going to go, myself.'

I hadn't told him that I was in Europe. I had never been in Europe.

And he said to me, 'I would love to go,' he (129) said, 'but I can't afford it right now.' And I said, 'That's a

shame.' And that was the end of the conversation about going to Europe. I didn't offer him any trip to Europe or anything like that.

Q. Then he added, suddenly, just before the fork dropped, a question: 'Five thousand?'

Did you use that expression? A. No, sir, I did not.

Q. How was that figure injected in the conversation, if it was? A. Earlier, when we first got into the restaurant, he was telling me about his boss was opening a new store in a few months and that his boss offered him to come in as a partner if he had four or five thousand dollars, himself, capital; and he said, 'But I couldn't because I didn't have the money.'

And that was how the money even was involved in the conversation. He mentioned it himself, about the shoe store that his boss was opening in the future and he could have been a partner if he would have had the fee, the money.

Q. He also added something about that you said something to him about a shoe store, as if you were offering him a shoe store. How did that reference to (130) a shoe store arise?

* * * * *

Q. Proceed, Mrs. DeAlesandro. A. Well, as he was—first of all, when we were in the restaurant, he was talking about the case a lot, and, you know, I was interested. I have been voting for two years, and I told him that I was going to be available to be a juror myself. I said, 'It sounds interesting. It sounds like it would be fun.'

And he said—he was telling me all about the case, and he said, 'It is a big case,' he said. 'You might have read about it in the papers. It is the United States versus Armone.'

So I says, 'Armone? That name sounds familiar. I think I used to know somebody by that name.' And he said to me, 'Oh, really?' And I said, 'Yes.'

And then, that was—we started talking about something else. And then, later on, after he (131) had almost finished the bottle and we were getting ready to leave the restaurant, he said to me, 'How well do you know Armone? Maybe I could get a shoe store out of this for myself.'

Q. And what did you answer to that question A. And I said, 'I don't know what you are talking about.' I said, 'I wouldn't even involve myself in anything like that.'

And then he laughed and he said, 'Oh, I'm only kidding.' And I just took it, you know, in jest.

Q. Did you report that conversation to the Judge, the trial judge, or the U. S. Attorney on the following day? A. No, sir, I didn't.

Q. Why did you not report it? A. Because, as I said before, he had been drinking and he said it laughingly and I felt that he was, you know, only kidding about it; I never took it seriously at all."

Because of the importance which the Government attached to the evidence of supposed flight by Mrs. DeAlesandro, her counsel questioned her extensively on this subject (65a, *et seq.*). She testified that when she got home on the evening of the dinner with Feldman she told her husband where she had been, he became very angry, and she decided to leave him; she had no consciousness whatever of having committed any crime in connection with Feldman (65a-66a). The following day she left the marital home and went to an apartment maintained by one of her sisters-in-law in City Island as a vacation place; she had a key for that apartment, and had often used it on vacation weekends; she went there on this occasion because "I wanted to think out all my problems and my marriage and everything else"; she stayed there about four weeks during which "I carried on my normal life. I visited my girlfriend. I went to the beach. I wasn't hiding from anyone" (66a).

Toward the end of June "I just didn't seem to be able to figure out my problems myself, so I went to my mother's in Michigan" (65a). Her mother informed her that two men had been there who said her husband was in jail and they wanted her for questioning about something to do with her husband's being in jail, "And I didn't believe it; I thought this was my husband trying to make me come back, or one of his tricks" (66a).

Shortly after her arrival at her mother's place in Michigan, she with her mother and sister and a dog took a motor trip to California to visit her brother; "my mother had been planning a trip to go out to California to visit my brother, she hadn't seen him in three years and his wife was having a baby * * *. She says, 'Why don't you, you know, relax and stop thinking about him for awhile, and you will have a nice time [in California]' "; on the motor trip to California they stopped at hotels all along the way, "It was a vacation", and they arrived in California about seven or eight days after leaving Michigan (67a).

As soon as she arrived at her brother's home in California he told her that two FBI men were looking for her and said that she was wanted in New York for questioning, and that there was a warrant for her arrest; she had her brother immediately phone the FBI to find out what it was all about, and they left their telephone number for the Agent who had been looking for her; the Agent phoned back, came to the brother's house where Mrs. DeAlesandro was waiting, and she spoke with the Agent and went with him (67a-68a).

The Agent told her that he did not have any papers with him, they were at the office, but he knew she was wanted for questioning in New York about attempted bribery of a juror; she asked him, "Well, do I need a lawyer or anything", and she also said "I will have my brother call one", but the Agent said to her "You won't need one here. You will need one when you go back to New York. * * * If you do, the Judge will give you a

Public Defender, if there is any need for it''; as the Agent had said this to her, Mrs. DeAlesandro testified, ''So I went with him''; she further testified that when the Agent asked her if she had tried to bribe any juror she told him, ''No, sir, I don't know anything about it''; she was then brought back to New York (68a). She also testified that she told the FBI agent she had had marital troubles (69a).

When she was brought back to New York she was placed in a women's prison which she described as ''a terrible place'', her husband came there to see her, and ''I decided to go back with him. I was so frightened. He was being so good and everything'' (68a).

She testified that on May 18, 1965 she did not know a ''Joseph Armone''; she knew a ''Piney'' Armone; later her lawyer told her that they were one and the same person; she did not know on May 18, 1965 that Joseph Armone, known either as Piney or Joseph, was on trial in the Southern District; she had known Piney Armone for several years; no one on behalf of any of the defendants in the case of United States v. Armone had asked her to contact Kenneth Feldman for them (69a). She denied that at any time on May 18, 1965 she said anything to Kenneth Feldman with intent to influence him in the pending Armone case, or that she in any way endeavored corruptly to influence, impede or intimidate him in regard to that case (69a).

In the cross examination concerning her acceptance of Feldman's dinner invitation and the dinner conversation, her testimony on direct examination was unshaken in any significant respect (83a-86a). Likewise in the cross examination concerning her alleged flight, her direct testimony remained unshaken (86-92a), although it should be mentioned that she admitted that she believed she had told the FBI agent that when she left her apartment in New York she went to stay on ''Long Island'' rather than on ''City Island'', but at that time she thought the two were

the same and she had meant to say City Island (91a). She also remained unshaken in the cross examination concerning her direct testimony that the FBI agent who arrested her in California did not advise her of her rights, and had told her that she would not need a lawyer until she got to New York (90a).

4. Further As To The Trial Tactics Of The Prosecution.

The pertinent statements of the prosecutor which further illustrate the Government's appeals to passion and prejudice in this trial are taken up under our "Reasons", *infra*.

5. The Trial Court's Rulings On Issues Of Law.

At 126a the Trial Court charged the Jury as follows:

> "There was some testimony here to the effect—frankly, I don't recall it specifically, but at least it is the government's claim—that the defendant gave misleading statements to the FBI agents when they were questioning her. She denies that. If you find that she did give any misleading statements when questioned by agents of the Federal Bureau of Investigation, that she gave any false statement in an attempt to exculpate or exonerate herself, you may consider such false statement as circumstantial evidence from which consciousness (283) of guilt or criminal intent may be inferred. For it is reasonable to conclude that an innocent person does not ordinarily find it necessary to invent or fabricate an explanation or a statement tending to establish innocence."

At 97a the Trial Court, without hearing argument, denied defense Request No. 2 for instruction to the Jury which we have quoted *supra* in our "Questions Presented", Question No. 5.

Other pertinent rulings of the Trial Court are taken up under our "Reasons", *infra*.

6. The Decision Of The Court Of Appeals.

The Court of Appeals, in affirming the conviction (opinion printed in Appendix A hereto, *infra*), ruled as follows:

(a) As to the issue of the alleged false exculpatory statements, the Court rejected our contention that Mrs. DeAlesandro's statements to the arresting FBI agents were either mere protestations of innocence or involved no other material falsity. The Court of Appeals said that "According to the FBI agent, she told him that she did not know of any narcotics trial in New York, and that she had nothing to do with any juror in any such trial. Both of these statements are contradicted by her own testimony at the trial." We must respectfully note that the Court of Appeals is wrong here on the record facts. At 92a-93a, under vigorous cross examination, Mrs. DeAlesandro gave the following forthright and consistent testimony which completely refutes the above quoted statement of the Court of Appeals that the statements she had made to the FBI agent (according to the latter) were "contradicted by her own testimony at the trial":

> "Q. The agent questioned you about a narcotics trial in New York, didn't he? A. Which agent?
>
> (194) Q. The one in California. A. Yes.
>
> Q. And did you tell him that you didn't have any knowledge of a narcotics trial in the Southern District of New York? A. Yes, I did.
>
> Q. And at the time you told him that, you had known that Kenneth Feldman was a juror in a narcotics trial. A. I did not know it was a narcotics trial. He didn't say to me it was a narcotics trial, at any time.
>
> Q. Never said that. A. No. He said it was a big case. He didn't say to what it referred to at all.

Q. Did you tell the agents that, that it wasn't a narcotics trial but you had some contact with a big trial in New York? A. No, I didn't.

Q. You just told him you didn't know anything about a narcotics trial? A. That's right.

Q. And then he asked you whether you had any contact with one of the jurors in that case, is (195) that right? A. Yes.

Q. And you told him no, no contact. A. That's right.

Q. At the time you told him that, you knew that you had had dinner with a juror. A. I did not know he was a juror in a narcotics case. He asked me if I knew—did I ever go out with a juror in a narcotics case, which I did not know he was a juror in a narcotics case, and I said no, and it is true. I didn't know he was on a narcotics case.

Q. Did you attempt to explain to the agent the fact that you knew a juror in another case? A. No. He said to me, 'Do you know Kenneth Feldman?'

Q. And what did you say? A. I said yes. He said, 'Did you know he was a juror?' I said, 'Yes, but I didn't know what kind of a case he was on.'

Q. Did you hear the testimony of the FBI agent here yesterday? A. Yes.

Q. That you denied any knowledge? (196) A. Of knowing a narcotics case or a juror on a narcotics case. I denied it, yes.

Q. But you told him that you knew Kenneth Feldman. A. Yes. He asked me if I had been out with him.

Q. And you told him that he was the juror in a large case in New York? No, I did not tell him that. He told me that. He said, 'Did you know Kenneth Feldman was a juror?' I said, 'Yes, I did.'

He said, 'Did you know what kind of a case?' I said, 'No. I didn't know it was a narcotics case. He didn't mention it.' "

(b) The Court of Appeals rejected our contention that alleged false exculpatory statements should be admissible only if it is determined that they have been made after a defendant has been fully informed as to his constitutional rights to remain silent and to the assistance of counsel, and that in the present case a dispute between the defendant's testimony and that of the FBI agent as to whether the defendant was advised of her rights had never been resolved explicitly by the Trial Judge or submitted explicitly to the Jury. This contention of ours was rejected because the Court of Appeals was "by no means ready to accept defendant's premise that exculpatory and inculpatory statements stand on the same basis with respect to the need of warning"; and because in any event "we do not reach that issue here" since—

> "* * * Even in defendant's version of her arrest, she was at least in part aware of her right to counsel, and her statements were made in response to brief informal questioning. See *United States* v. *Cone*, 354 F. 2d 119 (2d Cir. 1965); *United States* v. *Robinson*, 354 F. 2d 109 (2d Cir. 1965). In any case, the defense raised no objection at trial either to the introduction of the statements in question nor to the court's instruction. Had prompt objection been made, the question of the extent to which defendant had been advised of her rights could have been explored and resolved. The failure to make timely objection precludes the raising of the point on appeal."

(c) As regards the tactics of the prosecution, the Court of Appeals rejected our contentions of prejudice. We had urged that the prejudicial effects were especially bad because the Government did not have a notably strong case against Mrs. DeAlesandro. The Court of Appeals, however, deemed that "the case against defendant could hardly have been stronger". Further, the Court of Appeals ruled against us on this issue of the prosecution's tactics because

of failure of the defense to object at the trial in most of the instances of prejudice claimed.

(d) The Court of Appeals said nothing about our argument that we were entitled to a jury instruction pursuant to our Request No. 2 (quoted in our Question No. 5 herein, *supra*). It may be that the Court of Appeals deemed its remarks concerning our entrapment argument (which we are not raising here) as covering our argument concerning Request No. 2, but if so the Court of Appeals was mistaken; see our "Reasons", *infra*.

(e) The Court of Appeals said nothing about our argument concerning the necessity for accomplice instructions.

(f) The Court of Appeals rejected our argument as to the duplicitousness of the indictment on the ground that Congress intended to create two separate offenses under the statutes involved.

Reasons for Granting the Writ

1. This case involves a most disturbing application of the peculiar doctrine that a defendant who makes "false answers" to police officers by way of self exculpation prior to trial thereby reveals a "consciousness of guilt" which is provable against him at his trial. In the Second Circuit this doctrine is illustrated in *United States* v. *Bando*, 244 F. 2d 833, 842 (C. A. 2 1957), cert. denied 355 U. S. 844; *United States* v. *Simone*, 205 F. 2d 480, 482-483 (C. A. 2 1953); *United States* v. *Smolin*, 182 F. 2d 782, 785-786 (C. A. 2 1950).

This doctrine—which we have just termed "peculiar" (and shall explain shortly why we view it so)—has received an especially strange application in the present case. It is an indispensable feature of this doctrine, we take it, that the pretrial "false" self exculpatory statements, in order to be receivable at the trial, must have been made by

an accused who had first been warned of his constitutional rights, including the right to remain silent and the right to counsel. *United States* v. *Bando, supra.* In our case FBI Agent Campbell testified, to be sure, that he warned Mrs. DeAlesandro of her rights, etc. (36a). But Mrs. DeAlesandro flatly denied that she had thus allegedly been warned, and in fact she testified quite circumstantially that she asked Agent Campbell almost at once whether she needed a lawyer and the Agent told her that she would not need one until she got to New York (68a, 90a).

We are not now saying that this direct conflict of testimony between Agent Campbell and Mrs. DeAlesandro must be resolved by this Court in favor of our young lady petitioner; nor are we saying that the issue *had to be* resolved in her favor at the trial. But we are saying, with utmost respectful emphasis, that the issue could not be (as it was) *totally ignored* at the trial, for the following reasons: If, as appears from, *e.g.*, the Second Circuit's decision in *Bando, supra,* the peculiar rule in question depends prerequisitely upon the accused's having been warned, how can a Jury legally (or indeed constitutionally) be told that they may consider "false" exculpatory denials unless they are first also told that where (as here) the case presents a direct conflict of testimony between the arresting officer and the accused on the issue of constitutional warning—these being the two sole witnesses on the point in our case—the Jury must make a determination as to which of these two witnesses they believe on the issue of constitutional warning before the Jury has any right to go on and consider the effect of the alleged false exculpatory statements as independent circumstantial evidence of consciousness of guilt? No such instruction was given to the Jury in this case as to this plainly indispensable and prerequisite determination of the directly controverted testimonial issue of "constitutional fact" as to the Agent's warning to Mrs. DeAlesandro. Indeed, we think it is correct to argue further that the Jury's determination of

this issue of constitutional fact would have had to be guided by still another instruction by the Trial Judge which is of the utmost constitutional necessity in this type of situation, namely, an instruction concerning the very potent constitutional presumption *against* any waiver of personal consititutional rights. Alternatively, even if it were to be argued by the Government that the Trial Court is somehow "presumptively" to be regarded as having resolved this issue on its own, it seems to us that the Trial Court would be obliged to announce a finding to that effect, somewhere in the record.

In the colloquy at the conclusion of the proofs in this trial, when the Trial Court and the parties were discussing the requests to-charge, the Court did show alertness to one phase of the problem of the alleged false exculpatory statements, but this alertness was confined to the question of whether the particular alleged false statements which the Jury might find had been made would be of such a character as to be probative for the purposes of the doctrine of circumstantial evidence of consciousness of guilt; that is, the Court was not speaking at all (in the colloquy referred to) of the anterior issue of disputed fact as to whether the accused had been adequately warned of her constitutional rights to remain silent and to assistance of counsel; and we must regretfully concede that defense counsel likewise was apparently not alert to the latter problem (102a-103a).

In view of defense counsel's failure to raise the anterior issue of the disputed state of the "constitutional facts" as to adequate warning to the accused, we are obliged to invoke the "plain error" rule. Favoring this request for the benefit of the "plain error" rule, we submit, is the circumstance just noted that in the colloquy on this subject the Trial Court, in common with counsel, was apparently not alert to this anterior constitutional problem. But most strongly favoring our request in this regard is the sheer

constitutional importance of the issue. It has become an issue of constitutional dimension in the most fundamental sense in the light of *Escobedo* v. *Illinois*, 378 U. S. 478; *Miranda* v. *Arizona*, —— U. S. ——, 16 L. Ed. 2d 694; *Johnson* v. *New Jersey*, —— U. S. ——, 16 L. Ed. 2d 882.

Mrs. DeAlesandro's trial took place November 15-17, 1965, so that *Escobedo* at least applies. *Johnson* v. *New Jersey, supra.* The *"Escobedo"* character of our facts—leaving aside for the moment the question of inculpatory *versus* false exculpatory statements—is very pronounced. Here, as in *Escobedo,* law enforcement officials took the defendant into custody and interrogated her for the purpose of obtaining damaging statements. The defendant in our case claims that the police did not effectively advise her of her right to remain silent or to consult with an attorney, and that on the contrary the arresting agent in effect tricked her out of having the attorney whom she was prepared to have her brother summon. The very fact that an issue intrinsically resided in the trial record as to the defendant's *versus* the arresting agent's testimony about apprisal of her constitutional rights, and that this issue was never resolved by the Trial Court or by the Jury under any instructions from the Court, endows the *"Escobedo"* question here with the vitality of an unresolved issue of "constitutional fact", an issue which of constitutional necessity affects this conviction.

As regards the question of inculpatory *versus* false exculpatory statement, it does not seem likely that this Court's equating of those two categories in *Miranda* (16 L. Ed. 2d at 706, 725) was intended to be operative only under the rule of prospectivity for *Miranda* and not for *Escobedo,* because this equating of the inculpatory and false exculpatory categories seems to us so fundamental in the substantive sense that the procedural and practical law enforcement considerations which the Court in *Johnson* v. *New Jersey* mentioned as affecting its policy of

prospectivity *vel non* should not apply with respect to this equating of the aforesaid two categories.

In any event, since *Escobedo* is applicable here (in point of the prospectivity ruling of *Johnson* v. *New Jersey*), and since it would seem important to have an explicit clarification as to whether the equating of inculpatory and false exculpatory statements in *Miranda* falls under the prospectivity rulings of *Johnson*, certiorari should be granted in the present case precisely in order to clarify this important question.

In our discussion thus far of the issue of the alleged false exculpatory statements we have been treating the point on the basis of the determination of both of the Courts below that the case did in fact involve false exculpatory statements of the kind which may properly bring into play the rule of circumstantial evidence involved. We think we showed in our Statement of the Case, in the portion where we described the opinion of the Court of Appeals, that in actuality this trial record did not involve any such false exculpatory statements by the present defendant, but only protestations of innocence plus certain other statements which were not shown to be false. We have aimed at examining all of the Federal decisions on the false-exculpatory-statements rule (see "Key Number" 351, particularly sub-divisions (2) and (10), under "Criminal Law" in the West Company Decennial System), and there appears to be no case in which this false-exculpatory-statements rule has been applied so simplistically and unjustly as happened here. That is, we have found no other case where this doctrine has been applied in the out-and-out boot-strap-levitational manner of the present case, where the only "false exculpatory statements" consist of nothing more than assertions of innocence by the accused, or assertions by the accused that he (she) does not know anything about the charge, or an innocent explanation of alleged flight. In such circumstances, is it not "peculiar"—to put it mildly and as we earlier ventured to

term it—that a defendant in a criminal prosecution should be subjected to a theory of independent confirmatory circumstantial evidence of guilt, by way of "proof" of "consciousness of guilt" on the basis of nothing more than the defendant's having previously protested her innocence to an arresting officer? We think it is proper to say that what has happened here, as regards the uncritical application of this peculiar doctrine of "false exculpatory statements", is that a merely doctrinal formalism, a merely nominalistic "application" of a "doctrine" which seems to us to have never been well thought out anyhow in the Federal decisions on this subject, has availed to tighten the "probative" noose of "circumstantial evidence" around the neck of the within petitioner. In law, as in other branches of life where rationality is supposed to prevail, things or concepts should not be allowed to attain an existence based on nothing more than their names; their *effective* and *concrete* meanings and impingements must be taken into account. This basic test of rationality and fairness in the administration of legal doctrines was lost sight of, we respectfully submit, when the Trial Court uncritically and nominalistically applied to the case of Mrs. DeAlesandro the "rule" concerning "false exculpatory statements".

2. The improper conduct of the prosecutor at the trial caused a miscarriage of justice which this Court should redress in exercise of its powers of supervision over the administration of Federal criminal justice.

This was not a case of overwhelming or even strong proof of guilt. Feldman's own admitted conduct towards Mrs. DeAlesandro in seeking a rendezvous with her, the circumstantially convincing nature of Mrs. DeAlesandro's testimony that Feldman became garrulous during the dinner, the lack of any corroboration of the vital portions of Feldman's testimony concerning improper offers of bribery by Mrs. DeAlesandro, and the at worst equipoised proofs of

the prosecution and the defense on the issue of alleged flight, are among the factors in this case which we believe justify our saying that the Government did not prove a "strong" case against Mrs. DeAlesandro. In a fair and dispassionate trial atmosphere, Mrs. DeAlesandro could have expected, we earnestly submit, a strongly realistic prospect of acquittal by the Jury.

Unfortunately, however, the atmosphere of the trial was far from dispassionate. The Government apparently realized that, with nothing except Feldman's own testimony on the alleged bribe attempt plus the by no means clear-cut proof as to flight, something more had to be done to ensure a conviction in this case. The jurors' emotions, and not only their sense of justice, had to be aroused to ensure a conviction here. The Government's appeal to the jurors' emotions combined two devices, the arousing of the jurors' ambivalently virtuous indignation on the score of Mrs. DeAlesandro's alleged machinations as a sexual temptress, and the arousing of a sense of emotional identification between these trial jurors and the valiant and virtuous young ex-juror Kenneth Feldman. In our Statement of the Case, *supra,* we have described the methods by which the prosecution played upon the jurors' virtuous sensibilities in regard to Mrs. DeAlesandro's allegedly tempting physical appearance. Let us now note the items in the record for the other branch of the prosecution's appeal to the jurors' emotions, the arousing of an "official" sense of emotional identification with the ex-juror Feldman:

This latter theme was introduced by the Government at the very outset of the case in the prosecutor's opening to the Jury (9a):

> "(4) You may be interested to know how this case began. Well, it was formally commenced in July of this year when a grand jury, a *group of people com-*

posed very much like yourselves, sitting in this courthouse, voted an indictment against the defendant.

* * * * *

Essentially the crimes charged in the indictment concern jury tampering, an attempt by the defendant to approach a juror, *very much like yourselves, sitting in fact in this courthouse, and in fact in this very room,* during May of this year, specifically May 18th. The attempt was to influence that juror in the rendition of his verdict so that the verdict might be favorable to those interests which the defendant represented." (Emphasis added)

There was no need and no justification for the Government thus to commence this trial with this sort of portentous declaration to the jurors that the crime with which the defendant was charged had been perpetrated, in effect, in relation to a person with whom the trial jurors ought personally to identify themselves; "It might have happened to you", the prosecutor was in effect saying to the trial Jury in the above quoted remarks in his opening statement.

That this technique of the prosecutor was by no means inadvertent or merely coincidental, was strikingly (and, for Mrs. DeAlesandro, destructively) confirmed in the prosecutor's summation to the Jury. Thus, near the beginning of the summation the prosecutor told the Jury—in connection with a plea to them that they should accept Feldman's credibility in the face of an inconsistency revealed by the bill of particulars—that "Feldman was a juror, just like you are jurors. All right? He sat in one of the seats in which you sit, in this very courtroom" (107a). A few moments later the prosecutor returned to this same theme, but with mounting intensity, and with a clever blend that added the other prejudicial theme earlier mentioned,

the theme of ambivalent virtuous indignation in the face of carnal temptation (107a-108a):

> "That juror sat for almost two weeks in a case just like you did, and he saw what government witness must go through. All right? The cross-examination, (246) the impugning of some evil motive to a government witness, and that troubles me somewhat because in order to acquit the defendant you must brand the testimony of a juror, just like you, as perjury, that the testimony was perjurious. You must find that he was a liar because he told Judge Bonsal what occurred the following morning.
>
> Secondly, you must rule him to be a corrupt juror because he violated the oath which all of you took, the oath to give a verdict on the law and the evidence as presented. It was he, wasn't it, that the defendant said made the initial approach? He was a corrupt juror. And do you think it would be enough for that young lady to charge from that witness stand? No. She made him into some sort of inept lover.
>
> • • • • •
>
> (247) I have often wondered, as I sat here for two days, what the saddest part of this case was. Was it the pernicious and abhorrent crime the defendant committed or was it the fact that she took the stand and perjured herself, or was it in fact the far brush with which she sought to brand Mr. Feldman as a perjuror, a liar, a corrupt juror and an inept lover? • • •"*

The prosecutor's summation concluded with a peroration in which the above exhortations to this trial Jury to identify themselves subjectively with Kenneth Feldman were brought to a ringing, pounding climax. This perora-

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* The prosecutor's secondary theme here of appealing to what we have termed ambivalent virtuous indignation has a familiar literary prototype in Mr. Somerset Maugham's "Rain".

tion is too lengthy to be quoted here, but it is set forth in full in our printed appendix, commencing with the last paragraph on page 110a and ending at the bottom of page 112a. In that peroration the prosecutor, practically in so many words, asked the trial jurors to visit upon Mrs. DeAlesandro not only a merited punitive justice, but a vengeance; we think this does not unfairly characterize the closing theme of the prosecutor's peroration (112a).

It seems appropriate to mention also that this same excessively stern idea found its way into the closing words of the Trial Court's instructions to the Jury, which otherwise (we freely concede) were entirely moderate in tone, the Court closing its instructions with the words that if the jurors found the Government had established guilt beyond a reasonable doubt they should not hesitate to render a verdict of guilty "as a clear warning to all that no one can tamper with the American, impartial jury system, which is the very cornerstone of our democratic institutions, and get away with it" (127a).

Standing alone, these last quoted words of the Trial Judge, in his instructions to the Jury might not be deemed aggrieving in a prosecution for jury tampering. But in the entire setting of the case as "worked up" through the prosecutor's emphatic and repeated exhortations addressed to the jurors' own subjective emotional sensibilities, it respectfully seems to us that the above quoted words of the Trial Judge do give rise to an aggrievement; those closing words of the Trial Judge were virtually the last words of the Judge which the jurors heard as they were about to enter the juryroom to commence their deliberations (127a-128a).

It is hardly necessary to cite authority for the proposition that conduct by a Federal criminal prosecutor of the type above described may require reversal of a conviction. As recently as *Singer* v. *United States*, 380 U. S. 24, 37, this Court said, "• • • We reiterate the sentiment ex-

pressed in Berger v. United States, 295 U. S. 78, 88, that the Government attorney in a criminal prosecution is not an ordinary party to a controversy, but a 'servant of the law' with a 'twofold aim . . . that guilt shall not escape or innocence suffer'." Improper resort by Federal prosecutors to personalized or emotion-oriented methods have been repeatedly disapproved. E.g., *U. S.* v. *Kravitz,* 281 F. 2d 581 (C. A. 3 1960), cert. denied 364 U. S. 941; *Edgington* v. *United States,* 324 F. 2d 491 (C. A. 10 1963); *Dunn* v. *United States,* 307 F. 2d 883 (C. A. 5 1962) (inflammatory opening statement); *United States* v. *Bugros,* 304 F. 2d 177, 179 (C. A. 2 1962) ("It is the prosecutor's obligation to avoid arguments on matters which are immaterial and which may serve only to prejudice the defendant. It is his duty above all else to be fair and objective and to keep his argument within the issues of the case"; *Traxler* v. *United States,* 293 F. 2d 327 (C. A. 5 1961); *Dugan Drug Stores, Inc.* v. *United States,* 326 F. 2d 835 (C. A. 5 1964); *Greenberg* v. *United States,* 280 F. 2d 472 (C. A. 1 1960).

3. Our Request No. 2 for instruction to the Jury (quoted in our Questions Presented, no. 5, *supra*) formulated the defense theory of the evidence. This Request No. 2 was the very heart and essence of the position which the defense wanted and needed to have before the Jury in their deliberations. It took into account, fairly and realistically, the entirely believable view of the evidence that the two young people who dined together on the evening of May 18, 1965 may have foolishly drifted into loose and indiscreet—but not corruptly or criminally intended—conversation in which Feldman himself was at least as much at fault as the defendant.

The Trial Court denied Request No. 2, without hearing argument (97a). The Court of Appeals, as seen, did not mention this phase of the case at all in its opinion, perhaps deeming that it was covered by the discussion in the opinion on entrapment; but Request No. 2 was not for an

entrapment instruction, and the entrapment discussion in the opinion below manifestly does not touch the more comprehensive issues posed by Request No. 2.

While the Trial Court told the Jury in the instructions that it was not undertaking a lengthy review of the evidence, it did present a summary of the evidence (118a-121a, 122a, 123a-126a), but it appears that the closest that the Court came to formulating for the Jury the opposing factual contentions of the parties was merely by instructing them that they had to resolve the issue of credibility as between Feldman and Mrs. DeAlesandro. This was not enough. The defense was entitled to an integrated formulation along the lines of Request No. 2, and it was prejudicial error to deny that request.

It is fundamental that a defendant in a criminal prosecution is entitled to a proper jury instruction presenting his theory of the case. *Calderon* v. *United States*, 279 Fed. 556, 558 (C.C.A. 5 1922):

> "Where the evidence presents a theory of defense, and the court's attention is particularly directed to it, it is reversible error for the court to refuse to make any charge on such theory. Bird v. United States, 180 U. S. 356, 361 21 Sup. Ct. 403 45 L. Ed. 570; Hendrey v. United States, 233 Fed. 5, 18, 147 C.C.A. 75; Liner v. State, 124 Ala. 1, 7, 27 South, 438; Banks v. State, 89 Ga. 75, 14 S.E. 927. * * * "

See also *Levine* v. *United States*, 261 F. 2d 747 (C.A.D.C. 1958) (collecting the authorities).

4. During a colloquy at the end of the trial proofs concerning the requests to charge, the prosecutor himself suggested that if the defense were correct in its request for an entrapment instruction* then the case would belong also

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* We are not here urging any entrapment issue, which was urged in both of the Courts below on a theory of the right to plead the "inconsistent" defenses of innocence and entrapment.

to the category where the charge must be given that the complaining witness is a confederate or an accomplice (99a).

We concede that the defense did not request any "accomplice" charge, except insofar as such was implicit in the request for a charge on entrapment; we think it was also implicit in our Request to charge No. 2 (*supra*).

If the maintainability of our contention that the cautionary charge on accomplice testimony should have been given depends upon our receiving the benefit of the "plain error" rule, we hereby respectfully invoke that rule. We realize that failure to give such instruction has tended, especially in the absence of a request therefor, to become regarded as not amounting to reversible error. E.g., *United States* v. *Stromberg,* 268 F. 2d 256 (C. A. 2 1959), cert. denied 361 U. S. 863. However, in view of the pervasive elements of unfairness which are believed to have tipped the scales of justice against the defendant in this case, we respectfully press the contention.

If the cautionary accomplice instruction should have been given, as we maintain, the "better practice" would have been to instruct also that the Jury should not believe Feldman unless it found that his testimony was corroborated. *Holmgren* v. *United States,* 217 U. S. 509, 523-524, states that "It is undoubtedly the better practice for Courts to caution juries against to much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them". This *Holmgren* language was by the unanimous Court, and it has never since been criticized, disparaged or departed from in any doctrinal sense by this Court in any other decision, including *Caminetti* v. *United States,* 242 U. S. 470, 495-496, which is so often cited (uncritically, we must say) for the proposition that corroboration of accomplice testimony is *never* required in Federal criminal prosecutions. *Caminetti* expressly noted the *Holmgren* rule and said "This is

so", going on to add merely that "There is no absolute rule of law preventing conviction on the testimony of accomplices if juries believe them" (242 U. S. at 495). Indeed about six months after *Caminetti* the Court in *Valdez* v. *United States,* 244 U. S. 432, expressly undertook to examine whether there had been corroboration of the accomplice testimony (at pp. 440-442). The *Valdez* case arose in the then Territory of the Phillipine Islands; from the report of the decision in *Valdez,* and from the description of the arguments and briefs of counsel in the Lawyers Edition Report (61 L. Ed. 1242 *et seq.*), it does not appear that the case involved any statutory or constitutional provision applicable to the Phillipines Territory which would have expressly required corroboration of accomplice testimony.

While the overwhelming majority of the decisions in the lower Federal Courts have ignored the "better practice" rule of *Holmgren* in recent decades, that rule has from time to time shown a continuing vitality. E.g., *Sykes* v. *United States,* 204 Fed. 909, 913 (C.C.A. 8 1913); *Fain* v. *United States,* 209 Fed. 525, 533 (C.C.A. 8 1913); *United States* v. *Murphy,* 253 Fed. 404, 406 (N.D.N.Y. 1918); *McGinnis* v. *United States,* 256 Fed. 621, 626 (C.C.A. 2 1919); *Freed* v. *United States,* 266 Fed. 1012, 1014-1016 D. C. App. 1920); *Wagman* v. *United States,* 269 Fed. 568, 572 (C.C.A. 6 1920); *Morenkow* v. *United States,* 276 Fed. 293, 294 (C.C.A. 6 1921); *Rudner* v. *United States,* 281 Fed. 516, 521 (C.C.A. 6 1922); *Rossi* v. *United States,* 9 F. 2d 362, 366 (C.C.A. 8 1925); *Lett* v. *United States,* 15 F. 2d 686, 689 (C.C.A. 8 1926). Cf. also the various indications of dissatisfaction with the non-corroboration rule in, *e.g., Arnold* v. *United States,* 94 F. 2d 499, 501, 506-509 (C.C.A. 10 1938); *Stewart* v. *United States,* 131 F. 2d 624 (C.C.A. 5 1942), cert. denied 318 U. S. 779; *Gordon* v. *United States,* 164 F. 2d 855, 859 (C.C.A. 6 1947), cert. denied 333 U. S. 862; *Smith* v. *United States,* 224 F. 2d 54, 60 (C. A. 5 1955); *Stanley* v. *United States,* 245 F. 2d 427,

433 (C. A. 6 1957); *Osborne* v. *United States*, 351 F. 2d 111 (C. A. 8 1965); *Masters* v. *United States*, 351 F. 2d 105 (C. A. 8 1965).

5. Petitioner was denied a fair trial and her constitutional right against being subjected to double jeopardy or double punishment by the submission to the Jury of both counts of the indictment. In a colloquy at the close of all of the trial proofs, the Court showed a proper concern about the seeming duplicitousness of Counts One and Two of the indictment, the Court's primary stated concern being that both counts appeared to embody the same essential allegations and to require the same essential proof, in that both counts alleged an offer of money or other valuable consideration (103a-105a).

In the instructions to the Jury the Court devoted considerable attention to its description and analysis of Counts One and Two of the indictment, but we contend that the Court never satisfactorily gave the Jury a clear or effectively resolving guidance as to the difference, if any, between these two counts; see 117a-118a, 121a-123a. The closest that the Court came to resolving for the Jury the problem of the supposed distinctness between the two counts was in the last full paragraph on page 122a.

We realize that this is a case of concurrent sentences under the two conviction counts; and that the defendant got the maximum five year sentence allowable under the second count (18 U.S.C. § 1503) rather than the maximum fifteen year sentence allowable under the first count (18 U.S.C. § 201); although we must point out also that the sentences could not very well have been kept equivalently "concurrent" if the Court had proceeded more distinctly on the basis of Count One in imposing a longer sentence.

The time may have come when Federal criminal prosecution no longer depends upon proof of an essential allegation in the indictment, such as the allegation in this in-

dictment that money or other valuables (as distinct from some merely generalized "endeavor") were involved, but it is hard to believe that matters have come to quite so slack a pass in the law of Federal criminal accusation and proof. Cf., e.g., *Thomas* v. *United States*, 151 F. 2d 183, 186-187 (C.C.A. 6 1945); *United States* v. *Negro*, 164 F. 2d 158, 171 (C.C.A. 2 1947).

We realize also that in *Gore* v. *United States*, 357 U. S. 387, this Court (although by a vote of five to four) adhered to the doctrine of *Blockburger* v. *United States*, 284 U. S. 299, that Congress may attach double or multiple penalties to a "single" criminal transaction where different Congressional interdictions are shown to be violated. And we realize also that when Congress amendatorily reenacted 18 U.S.C. § 201 in 1962 it specifically included subsection 201(k) to the effect that "the offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504 and 1505 of this title". We are also aware that the latter subsection 201(k) was the subject of a comment in Senate Report No. 2213, favoring the adoption of the 1962 Amendment of 18 U.S.C. § 2213, but we respectfully point out that this favorable comment concerning sub-section (k) was one of those merely generalized descriptive references with which Federal Judges and lawyers are familiar through their occasional perusal of Federal "legislative history" materials (*U. S. Code Congressional and Administrative News, 87th Cong., 2nd Sess. 1962*, Vol. 2, p. 3857).

Acknowledging, again, as we realize we must do, the factor that the sentences under the two counts of this indictment are concurrent, we nevertheless respectfully submit that, somewhere in the four corners of the protections denoted by the due process and double jeopardy provisions of the Constitution, there ought to be, there must be, a protection against subjecting an accused in a Federal criminal prosecution to duplicitous charges of crime, if only be-

because the accused is entitled to protection against the prejudicially over-awing effect upon jurors' minds of such double or multiple Grand Jury accusations. What we are saying, in short, is that the ultimate constitutional questions of due process and double jeopardy cannot be allowed to be reductively disposed of simply on the basis of the ultimate impingement of "concurrent" versus "consecutive" sentencing. Sheer considerations of clarity and fairness in submitting cases to juries must be given weight. Jurors who are told that they may adjudge a defendant's guilt or innocence under multiple charges are *ipso facto* placed in a state of mind of more stern potential condemnatoriness in proportion to the number of those multiples. It respectfully seems to us unrealistic to ignore this simple "fact of life" under the Jury system.

Besides, if the Jury in our case had had its attention focused upon the distinct charge of an offer of money or other valuables—as both counts of the indictment allege—is it not manifest that the defendant would have had a fairer chance for acquittal in view of the diametrical conflict between her testimony and the testimony of Feldman, a conflict whose resolution could scarcely have been rendered more adjudicatively obscure (at the Jury level) than by the amorphous manner in which the two counts were submitted for the Jury's consideration, i.e., amorphous in that the issue of money or other valuables was confused in the Jury instructions to the point of imponderability if not incomprehensibility (117a-118a, 121a-123a).

And if attention had been focused—as we say it properly should have been—on the alleged item of money or other valuables as expressly charged in each count, the Trial Judge (in view of his own expressed doubts at 103a-105a) would have been in a better position to require the Government to elect as between the two counts.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER,
H. ELLIOT WALES,
Attorneys for Petitioner,
Patricia DeAlesandro.

APPENDIX A

Opinion of United States Court of Appeals, Second Circuit, Affirming Judgment of Conviction.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 370—September Term, 1965.

(Argued May 4, 1966 Decided June 7, 1966.)

Docket No. 30310

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

PATRICIA DEALESANDRO,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
MOORE and FRIENDLY, *Circuit Judges.*

Appeal from a judgment of conviction on two counts of attempting to bribe a juror in violation of 18 U. S. C. §§201 and 1503, entered in the District Court for the Southern District of New York after trial before Hon. Lloyd F. MacMahon, *Judge,* and a jury. Affirmed.

Appendix A.

H. ELLIOT WALES, New York, N. Y. (Bertram Herling and Abraham Glasser, New York, N. Y., with him on the brief), *for the appellant.*

ROBERT C. MORVILLO, *Assistant United States* Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and Otto G. Obermaier, Assistant United States Attorney, with him on the brief), *for the appellee.*

MOORE, *Circuit Judge*:

This is an appeal from a judgment of conviction on two counts of attempting to bribe a juror. Defendant was sentenced to five years' imprisonment on each count, sentences to run concurrently.

The testimony of the Government's witnesses tended to show that on the afternoon of May 18, 1965, defendant Patricia DeAlesandro made some purchases in a shoe store managed by Kenneth Feldman, then serving as a petit juror in a narcotics conspiracy case entitled *United States* v. *Armone,* on trial in the Southern District of New York. Defendant struck up a conversation with Feldman while making her purchases. After some further conversation, they went out to dinner together. At the restaurant, defendant spoke of the unfairness of the machinery of justice against accused persons. She said she and her husband had a friend on trial at the United States Courthouse named Steve Armone, who had been wrongly accused. Feldman said no one of that name was on trial before him and, if he were, he wouldn't discuss it with anyone. She then asked how much money he made; whether he would like to

go into the shoe business on his own; and whether he would like a trip to Europe. He protested that he couldn't afford such things and tried to change the subject. She then asked: "Five thousand dollars?," and said: "Suppose a proposition were made to you whereby at the right time you would remember who your friends were?" Feldman said he wouldn't be interested. He asked for the dinner check and, after taking her home, called the Federal Bureau of Narcotics and told them what had happened.

Defendant's version of the dinner conversation was substantially different. She said that she suggested that he take a vacation, perhaps to Europe, only after he had said that he was tired of work. She denied offering him five thousand dollars or a trip to Europe. She said that after he began describing the case he was sitting on, she mentioned that she knew someone named Armone. He asked, "How well do you know Armone? Maybe I could get a shoe store out of this for myself?" He then said he was only kidding. She testified that after she went home from the restaurant, she had a fight with her husband and left home, going first to her sister-in-law's in City Island, then to her mother's in Michigan, and finally to her brother's in California, where she was arrested.

1. *The Tactics of the Prosecution.*

Defendant contends that she was denied a fair trial by the improper tactics of the prosecution, in that the prosecutor asked the jurors to identify themselves with Feldman, i.e., a juror like themselves; sensationally depicted her as a temptress; and argued that in order to believe her one would have to regard all the Government witnesses as perjurers; and misstated facts in its summation. According to defendant, all of these factors taken together justify reversal, particularly because the case against her was in her opinion so weak.

We disagree. In the first place, the case against defendant could hardly have been stronger. Feldman's version of her behavior in the store was corroborated; her story that marital difficulties forced her flight first to Michigan and then to California is hard to believe; she admitted that she knew Joseph Armone, one of the defendants on trial, and that she had talked of knowing him to Feldman, after finding out that he was a juror in a case with the same name. In the second place, her counsel at trial did not object to the prosecution's remarks to the jurors about Feldman being a juror as they were; nor did the defense object to the prosecution's few questions about defendant's physical appearance. In the absence of such objection, these tactics of the prosecution could be grounds for reversal only if extremely inflammatory and prejudicial. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238-39; *United States* v. *Johnson*, 331 F. 2d 281 (2d Cir.), *cert. denied*, 379 U. S. 965 (1964). These were neither. The questions on physical appearance did no more than bring out what she was wearing and what her hair looked like. The remarks about Feldman's status as a juror did not transgress the bounds of propriety in this jury-tampering case.

The defense did object to the prosecutor's wholesale use of the word "perjurer" in his summation. The judge permitted the prosecution to state that in order to acquit the defendant, the jury would have to find Feldman and the two sales clerks to be perjurers. He sustained a defense objection to the prosecutor's statement that in order to acquit defendant the Government witness Mendelsohn, a real estate agent, also had to be found to be a perjurer. These rulings were fair. The testimony of Feldman and the two sales clerks was in direct conflict with that of the defendant; the testimony of Mendelsohn was not. The prosecutor's remarks as to the testimony of Feldman and

the sales clerks were fair argument, and his remarks about Mendelsohn's testimony, as discounted by the comments of the court, were not prejudicial to defendant.

As for the alleged misstatement of facts in the summation, the prosecutor said the defense theory was that Feldman lied about the dinner in order to get out of jury duty. It is true that defendant did not suggest such a thing in her testimony, but the remark was fair since the defense counsel had inferred such a motive on Feldman's part during questioning. In any case, the defense did not object to the alleged misstatement at the time it was made.

The summation by the prosecutor did at times attempt to reach dramatic heights but at most it can be characterized as overly flamboyant but not prejudicially inflammatory. Forensic zeal by prosecutor and defense counsel alike is apt to be displayed in these final moments of trial. Although reviewing courts must be ever alert to make sure that a defendant's right to a fair trial not be jeopardized, no such jeopardy is to be found here. Again, however, it might be appropriate to remind counsel that their task is to deal with the proof objectively and that their personal views thereon should not be revealed to the jury. As to the charge, this being a jury tampering case, it was quite appropriate for the trial court to tell the jury that if they were satisfied of guilt beyond a reasonable doubt that ympathy or any other reason should not cause them to hesitate to render a verdict against defendant, "as a clear warning to all that no one can tamper with the American, impartial jury system, which is the very cornerstone of our democratic institutions and get away with it."

2. *The Treatment of the Alleged False Exculpatory Statements.*

The court instructed the jury that if it found that defendant made any false statements at the time of her arrest

in an attempt to exculpate herself, this might be considered as circumstantial evidence from which consciousness of guilt might be inferred.

Defendant argues that the doctrine fairly summarized in the judge's charge was inapplicable here. First, she contends that her statements to the arresting FBI agent were mere protestations of innocence, which proved nothing as to her guilt or innocence. This contention is without merit. According to the FBI agent, she told him that she did not know of any narcotics trial in New York, and that she had nothing to do with any juror in any such trial. Both of these statements are contradicted by her own testimony at trial. See *United States* v. *Wilson,* 342 F. 2d 43, 45 (2d Cir. 1965).

Second, she contends that alleged false exculpatory statements should be admissible only if it is determined that they have been made after defendant has been fully informed as to her constitutional rights, including the right to counsel. See *United States* v. *Bando,* 244 F. 2d 833, 842 (2d Cir.), *cert. denied,* 355 U. S. 844 (1957). In the present case, there was a dispute between defendant's testimony and that of the FBI agent as to whether defendant was fully advised of her right to counsel, a dispute which was never resolved explicitly by the judge or submitted explicitly to the jury.

We are by no means ready to accept defendant's premise that exculpatory and inculpatory statements stand on the same basis with respect to the need of warning. However, we do not reach that issue here. Even in defendant's version of her arrest, she was at least in part aware of her right to counsel, and her statements were made in response to brief informal questioning. See *United States* v. *Cone,* 354 F. 2d 119 (2d Cir. 1965); *United States* v. *Robinson,* 354 F. 2d 109 (2d Cir. 1965). In any case, the defense raised no objection at trial either to the introduction of

the statements in question nor to the court's instruction. Had prompt objection been made, the question of the extent to which defendant had been advised of her rights could have been explored and resolved. The failure to make timely objection precludes the raising of the point on appeal. *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965), *cert. denied*, —— U. S. —— (1966).

We find no merit in appellant's contention that the trial court erred in denying her requests for a charge on entrapment. Taking defendant's testimony at face value, she mentioned that she knew someone with the same name as the defendant in the case in which he was sitting, to which he said "How well do you know Armone? Maybe I could get a shoe store out of this for myself"—a statement he immediately qualified by saying he was only kidding. This is hardly a sufficient basis to support the submission of the question of entrapment to the jury. See *United States* v. *Kabot*, 295 F. 2d 848, 854 (2d Cir. 1961), *cert. denied*, 369 U. S. 803 (1962). The case bears no resemblance to those in which a defendant may have attempted to bribe an official out of fear of retaliation by the official who had previously announced his own bribability. E.g., *Capuano* v. *United States*, 9 F. 2d 41 (1st Cir. 1925); see Note, Entrapment by Government Officials, 28 Col. L. Rev. 1067, 1074 (1928).

Moreover, Feldman was neither a law enforcement official nor an agent of law enforcement officials. "The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents." *Lopez* v. *United States*, 373 U. S. 427, 434 (1963). The primary reason for the defense of entrapment is that "it is unthinkable that the government should prosecute those whom it has urged to commit the crime." *United States* v. *Romano*, 278 F. 2d 202, 204 (2d Cir. 1960). This being so, "if the initiator of the criminal

activity is not a government agent, the defense of entrapment does not apply." *Ibid.; United States* v. *Comi*, 336 F. 2d 856 (4th Cir. 1964), *cert. denied*, 379 U. S. 992 (1965); *Beard* v. *United States*, 59 F. 2d 940 (8th Cir. 1932); *Polski* v. *United States*, 33 F. 2d 686 (8th Cir.), *cert. denied*, 280 U. S. 591 (1921); Note, Entrapment, 73 Harv. L. Rev. 1333, 1340-42 (1960).

3. *The Sufficiency of the Evidence.*

Defendant contends that the evidence against her was insufficient to go to the jury, since Feldman testified that she mentioned that her friend who was on trial was "Steve Armone," and the only Armones on trial were named Joseph and Alfred. Joseph apparently had a brother named Steve, but he had died prior to 1965.

This apparent inconsistency did not destroy the Government's case against defendant. It was clear that she meant an Armone on trial. She said that her friend was on trial. The jury could well conclude that she was not making offers to Feldman in order to pay her respects to a dead man whom she never knew, but in order influence his decision in the Government's case against Joseph Armone, whom she admitted knowing.

The Court in marshalling the evidence said that defendant testified that she knew Steve Armone. This was not what she said; but the inadvertent misstatement was not objected to, and could hardly have been prejudicial. If anything, it reinforced defendant's argument that she had another Armone in mind than the one on trial.

4. *The Duplicitousness of the Indictments.*

Defendant contends that she was charged in two different counts for what amounted to the same crime. One count referred to 18 U. S. C. §201 (offering a price to a public official—defined to include a juror—with intent to

influence an official act—defined to include a decision on a case). The second charged violation of 18 U. S. C. §1503 (endeavoring to influence a juror in the discharge of his duty).

It is true that the two counts charged essentially the same acts. The first count charged defendant with giving, offering, and promising a thing of value to a petit juror, with intent to influence the juror's decision in a pending case. The second charged defendant with endeavoring to influence a petit juror in a pending case by offering the juror money and other things of value. Appellant contends that the joinder of the two counts may have had an adverse psychological effect on the jury, "by suggesting to it that defendant has committed not one but several crimes." *United States* v. *Ketchum*, 320 F. 2d 3, 8 (2d Cir.), *cert. denied*, 375 U. S. 905 (1963).

The fatal defect in the argument is that Congress has explicitly made defendant's conduct criminal in two separate statutes, and has indicated that the two are not to be regarded as defining the same offense. 18 U. S. C. §1503 proscribes any corrupt endeavor to influence a juror in the discharge of his duty "curruptly, or by threats or force." This statute, which provides for maximum penalties of a $5,000 fine and five years in prison, does not require for its violation an offer or promise of a thing of value. 18 U. S. C. §201 proscribes the offer or promise of anything of value to a public official with intent to influence any official act, and carries with it maximum penalties of $2,000 fine, 15 years in prison, and disqualification from federal office. The current version of §201 was enacted after the current version of §1503. By §201 (k), "the offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title." The Senate Report emphasizes that "the provisions of the section are not to supersede the

present statutes making it unlawful to obstruct justice by intimidating or influencing jurors or witnesses." S. Rep. No. 2203, 87th Cong., 2d Sess. (1962); 1962 U. S. Code Cong. & Ad. News 3852, 3857.

This history makes clear the congressional intent to create two separate offenses, separately indictable and separately punishable. See *Gore* v. *United States*, 357 U. S. 387 (1958).

5. *The Disparagement of Defendant's Character Witnesses.*

Defendant finally contends that the prosecution unfairly disparaged the testimony of two of her character witnesses, by asking them on cross-examination whether they knew that defendant knew Joseph Armone. In both cases the court sustained defense objections to the questions.

Even had the court permitted the witnesses to answer these questions, it is clear that no grounds for reversal would have been established. *United States* v. *Gosser*, 339 F. 2d 102, 112 (6th Cir. 1964), *cert. denied*, 382 U. S. 819 (1965); *United States* v. *Giddins*, 273 F. 2d 843 (2d Cir.), *cert. denied*, 362 U. S. 971 (1960); see *Michelson* v. *United States*, 335 U. S. 469, 479, 482 (1948).

6. *Conclusion.*

The conviction is affirmed.

APPENDIX B

Judgment of Court of Appeals.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of June one thousand nine hundred and sixty-six.

Present: HON. J. EDWARD LUMBARD,
Chief Judge,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PATRICIA DEALESANDRO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

Statutes Involved.

Title 18, Section 201, United States Code

§ 201. *Bribery of public officials and witnesses.*

(a) For the purpose of this section:

"public official" means Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department agency, or branch of Government, or a juror; and

• • •

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty.

• • •

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

• • •

(k) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

Title 18, Section 1503, United States Code

1503. *Influencing or injuring officer, juror or witness generally.*

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person

or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.